

**Letter of Findings: 04-20200293
Returned Check Penalty
For the Year 2019**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The Department agreed with Out-of-State Business that it was entitled to abatement of a thirty-percent "returned check" penalty because its bank's failure to honor Out-of-State Business's sales tax payment was not due to willful neglect and because Out-of-State Business exercised ordinary business care and prudence in authorizing the electronic payment.

ISSUE

I. Administration - Returned Check Penalty.

Authority: IC § 6-3-2-2.8(2); IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-11-2](#).

Taxpayer argues that it is entitled to an abatement of a "returned check" penalty because it was not responsible for its bank's decision to dishonor Taxpayer's 2019 sales tax payment and because it acted with reasonable care in making the payment.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which owns and operates a chain of fast food restaurants including restaurants located in Indiana. Taxpayer routinely remits sales tax to the Indiana Department of Revenue ("Department"). Taxpayer attempted to make electronic payment of approximately \$50,000 in sales tax due for the November 2019 period. Taxpayer did so by arranging for "electronic payment" of the amount from its local out-of-state bank. When the Department submitted the Taxpayer authorized payment request, the out-of-state bank refused payment.

The Department issued Taxpayer a "Notification of Returned Payment" on January 2020. The notice explained that Taxpayer's bank had refused payment of the \$50,000, that the Taxpayer still owed the sales tax, and added a penalty of "thirty percent (30[percent]) of the face value of the payment or the unpaid tax"

Taxpayer disagreed with the Department's assessment of the thirty percent penalty and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Administration - Returned Check Penalty.

DISCUSSION

The issue is whether Taxpayer has met its burden of establishing that, in submitting the sales tax payment to the Department, it acted with reasonable care, caution, and diligence and that the failure to pay the tax was not due to its own willful negligence.

IC § 6-8.1-10-2.1 imposes a cumulative 30 percent penalty for failure to make payment of a trust tax such as sales tax. The statute provides in relevant part:

- (a) Except as provided in [IC 6-3-4-12\(k\)](#) and [IC 6-3-4-13\(l\)](#), a person that:
- (1) fails to file a return for any of the listed taxes;
 - (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
 - (3) incurs, upon examination by the department, a deficiency that is due to negligence;
 - (4) fails to timely remit any tax held in trust for the state; or
 - (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;
- is subject to a penalty.
- (b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10[percent]) of:
- (1) the full amount of the tax due if the person failed to file the return;
 - (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
 - (3) the amount of the tax held in trust that is not timely remitted;
 - (4) the amount of deficiency as finally determined by the department; or
 - (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.
- (c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.
- (d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.
- (e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.
- (f) The department shall adopt rules under [IC 4-22-2](#) to prescribe the circumstances that constitute reasonable cause and negligence for purposes of this section.
- (g) A person who fails to file a return for a listed tax that shows no tax liability for a taxable year, other than an information return (as defined in section 6 of this chapter), on or before the due date of the return shall pay a penalty of ten dollars (\$10) for each day that the return is past due, up to a maximum of two hundred fifty dollars (\$250).
- (h) A:
- (1) corporation which otherwise qualifies under [IC 6-3-2-2.8\(2\)](#);
 - (2) partnership; or
 - (3) trust;
- that fails to withhold and pay any amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#) shall pay a penalty equal to twenty percent (20[percent]) of the amount of tax required to be withheld under [IC 6-3-4-12](#), [IC 6-3-4-13](#), or [IC 6-3-4-15](#). This penalty shall be in addition to any penalty imposed by section 6 of this chapter.

In practical effect, Taxpayer was assessed a ten-percent penalty under IC § 6-8.1-10-2.1(a) and (b) because it failed to pay the \$50,000 sales tax due and was also assessed a twenty-percent penalty under IC § 6-8.1-10-2.1(h) because it is defined as an organization under IC § 6-3-2-2.8(2) which failed to pay sales tax withheld on behalf of Indiana. IC § 6-8.1-10-2.1(h) notes that the twenty percent penalty is "in addition to any penalty imposed by section 6 of this chapter."

However, Taxpayer argues that its good faith effort to remit the sales tax entitles it to abatement of the thirty percent penalty.

As with any assessment, it is Taxpayer's responsibility to establish that the thirty-percent penalty assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State*

In making its case, each taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, informed and reasonable interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

IC § 6-8.1-10-2.1(h) provides for abatement of these penalties if the affected taxpayer can demonstrate that failure to make payment was department "was due to reasonable cause and not due to willful neglect" Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.*

In addition, [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed"

Taxpayer offered the testimony of its bank manager to explain the bank's refusal to honor the electronic payment request. The manager explained that Taxpayer's account was "restricted" because the bank required Taxpayer - along with all of its business customers - to complete paperwork documenting that Taxpayer would cooperate with the banks efforts to comply with federal anti-money laundering requirements ("Bank Secrecy Act"). Taxpayer completed the paperwork and the bank lifted the restriction on Taxpayer's account. Subsequently, the bank discovered that it had asked Taxpayer to fill out incorrect forms and re-imposed the restriction on Taxpayer's business account. It was during this second restriction period that Taxpayer authorized the sales tax payment from the again restricted account, and the bank refused to release the funds to the Department resulting in the disputed penalty.

The bank manager explained that Taxpayer was unaware of the second account restriction, that Taxpayer has since completed the correct paperwork, and that Taxpayer always had sufficient funds in its account to pay the \$50,000 sales tax due.

Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of [this] taxpayer" the Department agrees that the thirty-percent penalty should be abated as required of the Department under IC § 6-8.1-10-2.1(d).

FINDING

Taxpayer's protest is sustained.

July 1, 2020

Posted: 10/28/2020 by Legislative Services Agency
An [html](#) version of this document.